

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 988 OF 1982
with
SPECIAL CIVIL APPLICATION NO. 989 OF 1982
with
SPECIAL CIVIL APPLICATION NO. 990 OF 1982
with
SPECIAL CIVIL APPLICATION NO. 991 OF 1982
with
SPECIAL CIVIL APPLICATION NO. 852 OF 1982
with
SPECIAL CIVIL APPLICATION NO. 1113 OF 1982

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

PADAM BAHADUR THAPA & ORS.

Versus

UNION OF INDIA & ANR.

Appearance:

MR RP SHARMA, for all the petitioners
MR RC JANI, Addl. Central Govt. Standing Counsel for the respondents.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 23/12/97

COMMON ORAL JUDGEMENT

These writ petitions preferred under Article 226 of the Constitution of India, six in number, arise of the orders of dismissal made against the Army personnel wherein common question of law is involved. These petitions are, therefore, with the consent of the learned Advocates, disposed of by this common judgment.

The petitioners who belonged to the lower ranks of the Army, are dismissed from service by orders made on 30th June, 1981. The root cause of the said orders of dismissal is an incident which occurred on 8th October, 1979. The petitioners belonged to 4th Battalion of 3rd Gorkha Regiment of the Army (hereinafter referred to as '4/3 RG, GR'). At the relevant time, the said Battalion was stationed at Ladakh, some 100 kms. north of Leh. On 8th October, 1979, one officiating Subedar Major Bhim Bahadur Rana (hereinafter referred to as 'Rana') and other Army personnel were ordered to march to Baldy Top, a hill top nearby, by Lt.Col. O.P. Bhatia, the Commanding Officer. Feeling enraged, the officiating Subedar Major B.B.Rana, protested against the order and after returning, addressed inflammatory speech to the Army personnel. He instigated all Army personnel to express their unwillingness to attend the Cadre party and many of them submitted to this inflammatory speech and raised their hands in his support. This reaction to Rana's protest resulted into a mutiny at around 22.00 hrs. that evening. The Army personnel went on rampage and damaged the officers' Mess Building and the furniture and beat two of the superior officers. On the date of the incident, after ordering the march to the Baldy Top, the Commanding Officer, Lt.Col. O.P.Bhatia had left the station to attend some business at Leh and all throughout the date, he was not present at the station. Consequently, an inquiry was ordered into the incident and as a result of the said inquiry, several Army personnel were subjected to Court martial of whom, two were acquitted while several others were dealt with departmentally and dismissed from service, while quite a few were exonerated. The present petitioners are amongst those who were dealt with departmentally and were dismissed from service.

Learned Advocate Mr. Sharma has appeared for all the petitioners and has raised only two contentions:

(a) The procedure set out in the Army Act, 1950 and the Army Rules, 1954 which is mandatory in nature has not been followed and there was no justification for dispensing with the inquiry as provided under Rule 17 of the Army Rules.

(b) The action taken by the respondents is arbitrary inasmuch as, some of the officers were subjected to court martial of whom two were acquitted and some were dealt with departmentally while many have been dismissed from service quite a few have been discharged from service.

In support of his contentions, Mr.Sharma has relied upon Section 20(3) of the Army Act, 1950 and Rules 17, 22, 23, 177, 180 and 182 of the Army Rules, 1954. Mr.R.C.Jani, the learned Additional Central Govt.Standing Counsel has relied upon Section 37 of the Act. Section 20 of the Act provides for dismissal, removal or reduction by the Chief of the Army Staff and by other officers. Sub-section (3) thereof provides that, "any officer having power not less than a brigade or equivalent Commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a Junior Commissioned Officer". Section 37 of the Act is incorporated in Chapter 6 of the Act which deals with "the offences." The said Section deals with Mutiny. It provides, inter alia, that any person subject to this Act who commits any of the following offences, that is to say:

(a);

(b);

(c) being present at any such mutiny, does not use his utmost endeavours to suppress the same; or

(d) knowing or having reason to believe in the existence of any such mutiny, or of any intention to mutiny, or of any such conspiracy, does not, without delay, give information thereof to his Commanding or other superior officer; or;

(e);

shall, on conviction by court martial, be liable
to suffer death or such less punishment as is in
this Act mentioned.

Rules 22 and 23 of the Army Rules, 1954 are incorporated in Chapter 5 dealing with investigation of charges and trial by court martial. Rule 22 provides for hearing of charges. Sub-rule (1) (as it was prevalent at the relevant time) thereof provides, inter alia, that every charge against a person subject to the Act other than an officer shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence. Sub-rule (2) of the said Rules enjoins upon a Commanding Officer to dismiss a charge brought before him if, in his opinion, the evidence does not show that an offence under the Act has been committed. Sub-rule (3) provides for procedure to be followed, if the Commanding officer is of the opinion that the charge ought to be proceeded with. Rule 23 of the Rules provides for procedure for taking down the summary of evidence. Rules 177 to 186 are incorporated in Chapter 6 which deals with court of inquiry. Rule 177 provides for composition of the court of inquiry. Rule 180 provides for procedure to be followed when character of a person subject to the Act is involved. Rule 182 provides that the proceedings of court of inquiry shall not be permissible in evidence against a person subject to the Act.

Mr. Sharma has submitted that, he does not question the authority of Lt. Gen. R.D. Hira, General Officer, Commanding-in-Chief, Southern Command, to make the impugned orders of dismissal. Mr. Sharma has submitted that, the findings recorded by the court of inquiry is not permissible in evidence, however, ignoring the provisions contained in Rule 180, findings recorded during the court of inquiry have been relied upon for imposing the punishment of dismissal from service upon the petitioners. He has further submitted that the provisions contained in Rules 22 and 23 are mandatory in nature and in the event the procedure laid down in the said Rules is not followed, the inquiry as well as the orders of punishment shall stand vitiated. He has submitted that, in respect of the petitioners, neither the procedure laid down in Rule 22 nor the procedure laid down in Rule 23 has been followed, inasmuch as, the hearing of charge has not taken place in presence of the petitioners as is required under Rule 22. He has submitted that, in course of summary of evidence, nobody

deposed against the petitioners nor any statements were made which would implicate the petitioners of any misconduct. The petitioners, therefore, had no reason to cross examine any such witnesses. He has submitted that since there was no evidence against the petitioners, the orders of dismissal made against the petitioners are without any basis and require to be quashed and set aside. Mr. Sharma has contended that, Rule 17 enjoins upon the Competent officer to inform a person of the particulars of the course of action against him and allow reasonable time to state in writing any reason he may have to reach against his dismissal or removal from the service. Hence, the petitioners were entitled to be furnished with the particulars of the course of action against them and a reasonable opportunity to defend themselves. In the present case, the said procedure has not been followed. It must, therefore, be presumed that the competent officer has invoked the powers vested unto him under the proviso to Rule 17. The proviso to Rule 17 empowers an officer competent to order the dismissal or removal, if in his opinion, it is not expedient or reasonably practicable to comply with the provisions of the said rule to order the dismissal or removal without complying with the procedure set out in the said rule. Mr. Sharma has contended that, to invoke the powers vested under proviso to Rule 17, the competent officer must form an opinion that it is not expedient or reasonably practicable to comply with the provisions of the said rule. In the present case, no such opinion has been formed and the petitioners could not have been dismissed from service, without complying with the procedure contained in Rule 17. He has further submitted that, in respect of the petitioners, no circumstances existed which would render an inquiry inexpedient or reasonably impracticable and, therefore also, the proviso to Rule 17 could not have been invoked and the petitioners could not have been dismissed from service.

Mr. Sharma has next contended that, many persons who participated in mutiny or who were present at the time of mutiny were subjected to court martial and two of them were acquitted. If the petitioners were subjected to court martial, they also would have been acquitted. He has emphasised that there was no evidence against the petitioners and in no circumstances, they could have been visited with any punishment. In support of his arguments, Mr. Sharma has relied upon the judgments of several High Courts and Supreme Court in the matters of :

1996 MP 233];

- (2) M.S.OBEROI (RETD.) v. UNION OF INDIA AND ANOTHER, [1995 L&IC 753 (KARNATAKA)];
- (3) BIRENDRA RAO PAUL v. UNION OF INDIA AND OTHERS, [1994 L&IC 1019 (ALLAHABAD)];
- (4) BALWANT SINGH v. UNION OF INDIA AND ANOTHER, [1992 Cr.LJ 1712 (JAMMU & KASHMIR)];
- (5) N/B SUB AVTAR SINGH v. UNION OF INDIA AND OTHERS, [1989 Cr.LJ 1986];
- (6) MAJOR RADHAKRISHNAN v. UNION OF INDIA AND OTHERS, [1996 (3) SCC 507];
- (7) LT. COL. JAGGA SINGH v. UNION OF INDIA AND ANOTHER, [1996 (2) SLR 167 (DELHI)];
- (8) EX. MAJOR N.R.AJWANI AND OTHERS v. UNION OF INDIA AND OTHERS, [1994 L&IC 2122 (DELHI)];
- (9) THAM BAHADUR GAURANG AND OTHERS v. UNION OF INDIA AND OTHERS, [1984 (1) GLR 429]; and
- (10) LANCE DAFEDAR LAXMAN SINGH v. UNION OF INDIA AND OTHERS, [(II) 1993 (1) CRIMES 372 (DELHI)].

In the matter of R.P.SHUKLA (supra), the Madhya Pradesh High Court, relying upon the earlier judgment of the Supreme Court in the matter of Prithi Pal Singh v. Union of India (AIR 1982 SC 1413) held that, the provisions contained in Rule 180 are mandatory and the presence of the accused at the court of inquiry was necessary. If the accused is absent at the court of inquiry, all subsequent proceedings, i.e. showcause notice, summary court martial etc., would be void ab-initio. In the matter of M.S.OBEROI (supra), the Karnataka High Court held that the decision even if taken by the highest authority of the Army force can be subjected to the judicial review. In the case before the High Court, the petitioner was compulsorily retired without holding any inquiry on the allegation that the petitioner had an affair with the wife of a brother officer, and the fact concerned a senior officer and his wife and the situation was embarrassing. The Court held that, it was no ground to dispense with the inquiry which could have been done in camera. On the facts of the present case, these judgments shall have no applicability. In the matter of BIRENDRA RAO PAUL

(supra), the Allahabad High Court was considering a case of trainee Army personnel against whom no inquiry was held. The Court held that, even the trainee Army personnel were governed by the Army Act. The order of reduction in rank made against a trainee Army personnel without conducting any inquiry against him was held to be bad. On the facts of the present case, this judgment also shall have no applicability. In the matter of BALVANT SINGH (supra), the Court was considering the validity of a summary court martial held against the writ petitioner. Mr. Sharma has, however, relied upon the observations made on page 1715 made in respect of Rules 22 to 24 of the Rules. It is observed that, Rules 22 to 24 provide the procedural safeguards to an accused person. In the matter of N/B SUB. AVTAR SINGH (supra), the Court held that the requirements of Rule 22, i.e., hearing of charge is mandatory and non-compliance of the same would vitiate the entire proceedings. In the matter of LT. COL. JAGGA SINGH (supra), the Court was considering an order of summary dismissal made under Rule 14 of the Rules. The Court held that the summary dismissal of the officer after having initiated the disciplinary proceedings without trial by the court martial was illegal, unjust and without jurisdiction. The Court held that in view of the disputed question of facts involved in the case, the trial by the court martial is a must. In the matter of MAJOR RADHAKRISHNAN (supra), the Court was considering termination of service of a permanent Commissioned Officer for a misconduct without trial by a court martial on the ground of such trial being impracticable on account of expiry of period of limitation. The Court held that, "the satisfaction about the inexpediency or impracticability of the trial has to be obtained on consideration of the reports on the officer's misconduct. That necessarily means, that the misconduct and other attending circumstances relating thereto have to be the sole basis for obtaining such a satisfaction." In the matter of EX. MAJOR N.R. AJWANI (supra), the Full Bench of the Delhi High Court was considering an order of termination of service under Section 18 of the Act, invoking Doctrine of Pleasure of President. The Court held that, even such an order is subject to the judicial review, and the order can be challenged on the ground that it is camouflage. Mr. Sharma has particularly relied upon paragraphs 31 and 32 of the said judgment. In paragraph 31, the Court has observed that, "the fundamental rights can be restricted only to the extent provided for in the Army Act and not otherwise. What is not specifically or impliedly taken away by the Army Act inheres in the Army personnel." In paragraph 32, the Court has held that, "the Government is

bound to disclose the materials upon which the pleasure of the President was exercised. If the decision arrived at is found to be mala fide or based on wholly extraneous and irrelevant facts the exercise of the pleasure becomes patently illegal." In the matter of THAM BAHADUR GAURANG OTHERS (supra), this Court was examining the validity of the court martial held against the petitioners therein. Ironically, the petitioners therein were those persons who too were alleged to have participated in the mutiny committed on 8th October 1979 at Ladakh. This judgment is relied upon by Mr. Sharma only to show that of the 12 persons who were subjected to court martial, two were acquitted. In the matter of LANCE DAFEDAR LAXMAN SINGH (supra) also, the Court held that, the provisions contained in Rules 22 and 23 of the Rules are mandatory in nature and non-compliance as well as violation of the provisions of Rule 22 would vitiate the entire proceedings.

Upon perusal of the above referred judgments, the principles as are relevant for the purpose of the present petitions can be summarised as under:

- (a) The orders made against the Military personnel under the Army Act, 1950 and the Army Rules, 1954 are subject to the judicial review.
- (b) The procedure provided for under Rules 22 and 23 is mandatory in nature.
- (c) Before invoking the provisions contained in proviso to Rule 17, the officer competent to order the dismissal or removal, must form an opinion that it is not expedient or reasonably practicable to comply with the provisions of the said rule.

Mr.Jani, the learned Additional Central Govt. Standing Counsel has contested these petitions and has read over the affidavit made by one Lt. Col. V. Verma. He has also relied upon the judgment of the Supreme Court in the matter of UNION OF INDIA AND ORS., v. J.S. BRAR (AIR 1993 SC 773). Mr.Jani has particularly relied upon paragraph 14 of the said judgment where the Court has held that, "the High Court was not justified in interfering with the findings and sentences rendered by the GCM and confirmed by the Chief of the Army staff." He has submitted that the orders of punishment imposed upon the petitioners have been made after following the due procedure and they do not warrant interference by the High Court exercising its power of judicial review. He

has produced and relied upon the records of the inquiry conducted against the petitioners and others.

The question that arises for the consideration by this Court is whether the orders of dismissal are made against the petitioners after holding the inquiry or not and if the inquiry is held, the same is in accordance with law or not. I have perused the records of the inquiry. It is evident that, a large number of Army personnel were involved in the mutiny and the punishment to be imposed upon each of them would depend upon the extent of their involvement in the mutiny. After the incident, the Court of inquiry was held to ascertain the cause and nature of the mutiny that was committed on 8th October, 1979. After the Court of inquiry recorded its findings, each of the persons who were, prima facie, found to be involved in the mutiny was served with a chargesheet. Hearing of charge under Rule 22 was conducted and at the same time, the summary of evidence was also recorded. All the petitioners were present at the recording of summary of evidence and all the witnesses were offered for cross examination. The petitioners, however, chose not to cross examine the said witnesses. It is, thus, evident that the hearing of charge was conducted in presence of the petitioners and they were made present at the time of recording of the summary of evidence also. In my view, therefore, the punishment has been imposed upon the petitioners after following the procedure laid down in Rules 22 and 23 of the Rules. It is true that a Court martial was ordered against some of the personnel who were involved in mutiny while the petitioners were dismissed without a court martial. However, in my opinion, it is not necessary that all Army personnel must be subjected to Court martial. It is for the competent authority to decide whether an officer should be subjected to Court martial or should be dealt with departmentally. Merely because the Court martial may be more convenient or suitable to an accused Military personnel, the departmental proceedings held against such personnel cannot be vitiated. I am unable to agree with the contention of Mr. Sharma that there was no evidence against any of the petitioners and the petitioners were, therefore, not subjected to Court martial. It may be noted that all of the petitioners had raised a defence that they had not participated in the mutiny and all except one was not present in the Cadre party at 18.00 hrs. on 8th October, 1979 and none of them expressed his unwillingness to participate in the Cadre Party. They have also raised the defence that, at the time of mutiny, at 22.00 hrs. on 8th October 1979, they were not present on the scene.

However, on evidence, it is proved that all the petitioners were present at the Cadre party at 18.00 hrs. at the time when the officiating Sub. Major B.B.Rana gave an inflammatory speech. All of them submitted to the instigation and raised their hands in such submission, expressing their unwillingness to participate in the Cadre course. Their presence at the scene of the mutiny is also established. The competent officer has, therefore, not believed the defence of the present petitioners. This Court, exercising its power of judicial review, would not traverse beyond the findings recorded by the competent authority. The findings recorded are based on evidence on record. As recorded hereinabove, if an Army personnel having reason to believe in the existence of any mutiny or of any intention to mutiny, does not, without delay, give information thereof to his Commanding or other superior officer is also committing the offence of mutiny and is punishable as provided under Section 37 of the Act. In my opinion, any act of commission or omission subversive of discipline and insubordination in public employment is a grave misconduct, much so, in the Army. The persons who are found to be guilty of such misconduct cannot be continued in the service. The orders of dismissal made against the petitioners, therefore, do not warrant interference by this Court.

I reiterate that it is for the competent authority to decide whether a person accused should be subjected to Court martial or should be dealt with departmentally. Merely because, some of the accused persons were subjected to Court martial, the departmental action taken against the petitioners would not be vitiated. In the offence like the present one where several Army personnel were involved, every one should be liable to punishment subject to the extent of his involvement. All such Army personnel, therefore, may not be dealt with in an identical manner.

The apprehension voiced by Mr. Sharma that, the petitioners' services have been terminated by invoking the proviso to Rule 17 of the Rules is also not well founded. As discussed hereinabove, a proper inquiry has been held against the petitioners and it cannot be said that the petitioners have been dismissed from service without holding an inquiry considering such inquiry inexpedient or impracticable. The contention, therefore, requires to be rejected.

The petitions are, therefore, dismissed. Rule issued in each of the petitions is discharged. There

shall be no order as to costs.

Sreeram.